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IN THE

Supreme Court of the United States

October Term, 1957.

No. 801

G. W. THOMAS DRAYAGE & RIGGING COMPANY, INC., a corporation, W. R. BALLINGER & SON, a corporation, and MINNA M. BALLINGER,

Petitioners,

vs.

INDUSTRIAL INDEMNITY COMPANY, a corporation; INDUSTRIAL INDEMNITY EXCHANGE, a reciprocal exchange; T. G. McGUIRE, E. A. MATHIESSEN, S. E. HODAPP, J. V. CHAMBERS, M. S. FIELDS, E. E. URSIN, D. W. SCHIEBEL, W. A. HALUK, R. E. MAY, JR., R. L. JONES, JR., FRED DREXLER, N. S. YOUNG, THOMAS SOULE, J. P. TAHENY and V. E. HOWARD, JR., doing business as Industrial Service Company, a copartnership, HENRY J. KAISER, K. K. BECHTEL, S. D. BECHTEL, JOHN A. McCONE, W. A. BECHTEL, JR., T. G. McGUIRE, E. S. DULIN, F. SOMERS PETERSON, JAMES M. SMITH, M. I. SMITH, ALDEN G. ROACH, ROBERT L. BRIDGES, H. S. LORD, A. F. BISHOP, all of the aforesaid doing business as INDUSTRIAL UNDERWRITERS, a partnership, K. K. BECHTEL, L. T. KETT, F. SOMERS PETERSON, J. W. SCAMMELL, G. G. SHERWOOD, EMERSON SPEAR, A. G. STREBLOW, G. J. THOMPSON, W. E. WASTE, JOSHUA HENDY IRON WORKS, a corporation, INTERNATIONAL ENGINEERING COMPANY, INC., a corporation, and MARINE TERMINALS CORPORATION, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

REPLY BRIEF FOR PETITIONERS.

ROBERT W. KENNY,
1557 Beverly Boulevard,
Los Angeles 26, California,
FRANK B. BELCHER,
Attorneys for Petitioners.

BELCHER, KEARNEY & FARGO,
KENNY & MORRIS,
JEROME POLITZER,
MORRIS E. COHN,
HYMAN & HYMAN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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REPLY BRIEF FOR PETITIONERS.

I.

The Federal Questions Were Properly Raised, Were Necessary to a Determination of the Case, and No Adequate Non-Federal Ground of Decision Is Presented by Respondents.

Respondents are fruitlessly attempting to avoid any analysis of the second opinion of the District Court of Appeal (App. C; 144 A. C. A. 244, 301 P. 2d 112) which

reversed the judgment of the Superior Court and held that petitioners had had been unlawfully and arbitrarily deprived of their property privileges and interests (Pet. pp. 13-14). Of course, the judgment of the Supreme Court replaced the judgment of the District Court of Appeal, and it was a review of that judgment which is sought in this Court. But on the question of jurisdiction, the issue is not the effectiveness of the different judgments of the various courts, but whether the decision of the Supreme Court, in the light of all prior proceedings, was one which could not reasonably be anticipated (Pet. pp. 32-35).

In this connection, respondents do not dispute that the District Court of Appeal initially held that the unlawful transfer of Exchange by its unfaithful fiduciary was not a liquidation of Exchange, but a sale of a going business (Pet. pp. 9-10, 28-29); that "Company acquired the whole business of the Exchange as a going concern and would therefore benefit by the increase of its clientele" (App B, p. 529). Nor is it disputed that the District Court of Appeal thus held that the subscribers of Exchange "have a right to the business taken over by Company in consequence of the transfer and assumption agreement" (App. B, p. 539).

Nor do respondents dispute that they filed no petition for hearing from this first decision of the District Court of Appeal, that the issues were raised on a petition by an intervening party and that the petition for hearing was denied by the Supreme Court (Pet. p. 10). Respondents

argue that if the legal principles thus enumerated by the courts of California became settled (see Pet. p. 33), still the courts had the *power* to disregard them (Resp. Br. p. 12, fn. 9). But the question is not one of power, but whether petitioners had any reason to anticipate that the court below would arbitrarily exercise such alleged power in the case herein. Respondents have not met this issue (see Pet. pp. 21-30).

When the law of the case thus established was so plainly disregarded by the Superior Court, petitioners in accordance with the law of California (Pet. p. 33) properly sought redress from the same Appellate Court which had established the governing law. *That court sustained the position of petitioners on all respects* (Pet. pp. 13-14). The District Court of Appeal reviewed its prior decision (App. C, pp. 246-247), the subsequent proceedings (App. C, pp. 248-251), and held again that Exchange, in violation of law, had been sold as a going business and not for purposes of liquidation, that the subscribers were entitled to the net worth of the assets of Exchange including the investment earnings and the net profits resulting from the business of Exchange unlawfully obtained by Company (App. C, pp. 251-263).

It thus appears plain why respondents seek to avoid discussion of the decision and judgment of the District Court of Appeal on the case herein. At that point petitioners had been completely vindicated; respondents had been decisively condemned for their unlawful conduct. It was the decision of the court below, sharply divided, which

for the first time effectively gave respondents an uneffected windfall of over $5,000,000.00. That decision, for all the stated reasons, was a complete surprise and completely unexpected, and one which could not be reasonably anticipated (Pet. pp. 14-17, 21-30).

> "Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the State the federal questions here presented and is entitled to have them considered."
>
> *Missouri v. Gehner,* 281 U. S. 313, 320.

II.

The Court Below Arbitrarily Deprived Petitioners of Their Property Contrary to Fundamental Principles of Justice and Due Process of Law Embodied in the Fourteenth Amendment to the Constitution of the United States.

The respondents seek to support the judgment on the basis of "state law". They repeat the "findings" of the trial court, urge that the findings were supported by the evidence, and that the majority decision of the court below should therefore be undisturbed. It is significant that respondents also state that

> "irrespective of this legal result, K. K. Bechtel, the president of Company, affirmed its intention to see that the subscribers in fact received whatever would have come to them under the technically illegal agreement, less costs of litigation." (Resp. Br. p. 7, fn. 7.)

In short, respondents express willingness to pay the subscribers the stipulated sum of $1,018,539.07 although the only legally enforceable judgment against them is now in

the sum of $323,300.39. In assessing the arbitrary nature of the judgment of the court below, this significant concession of the malefactor, and its implications, should not be overlooked.

Respondents have made not the slightest attempt to dispute the petitioners' arguments that the holding of the court below was essentially arbitrary and capricious, unsupported by the evidence, and flowing solely from a failure to apply settled principles of justice and common law usages to undisputed facts. Respondents cannot dispute that Attorney and Company had the same stock ownership (App. A, p. 260); that the transfer of Exchange by Attorney to Company was not only in violation of express law, but in violation of fiduciary principles essential in an ordered society;* and that Company illegally obtained the business and assets of Exchange (Pet. p. 21).

Respondents have refrained from discussing the essential basis of the decision below denying the subscribers of Exchange the profits unlawfully appropriated by Company (Pet. pp. 23-27); the arbitrary nature of the ruling denying Exchange its investment earnings (Pet. pp. 27-29); and the wholly baseless ruling charging subscribers of Exchange for services rendered by Company to its own clients (Pet. pp. 29-30). Respondents would deny this Court's jurisdiction to review solely on the basis of the

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*Such violations by fiduciaries of insurance exchanges can always arise again and have an adverse effect on the public or other litigants. Respondents cannot, therefore, properly rely on *Rice v. Sioux City Cemetery*, 349 U. S. 70 (Resp. Br. pp. 5, 17), which is inapposite.

"findings", without proving that the findings are supported by the evidence and without showing that these findings are not intermingled with the federal questions here involved (see Pet. pp. 21-32, 34). Such failure of proof, in the light of the claims made by petitioners and their analysis of the record and legal issues in the petition for a writ of certiorari herein, renders the opposition of respondents to this Court's jurisdiction ineffectual, it is respectfully submitted.

> "In approaching cases, such as this one, in which federal constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."
>
> *Oyama v. California,* 332 U. S. 633, 636.

III.

A Substantial Federal Question Is Presented When It Is Claimed That a State Court Arbitrarily and Capriciously and Contrary to Inherit Principles of Justice Has Taken the Property of One Person and Given It to Another Without Compensation in Violation of the Due Process and Equal Protection Provisions of the Fourteenth Amendment.

Respondents, in disregard of the record and the claims of petitioners, have attempted to relegate the issue here to the question whether a judgment determining the ownership of property, after trial is reviewable by this Court for miscellaneous errors in law or in fact. (Resp. Br. pp.

16-18.) That is not the issue here. The question involved here is whether the judgment of the court below did not operate *to arbitrarily and capriciously* take the private property of Exchange and its subscribers, without their consent, for the private use and benefit of respondents, in violation of the pertinent provisions of the Fourteenth Amendment. Respondents have refrained from meeting those claims on the facts (Pet. pp. 19-32), and they have not disputed the applicable law sustaining this Court's jurisdiction when the conclusions of arbitrariness and injustice are sustained. (Pet. pp. 18-19, 30-32.)

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT W. KENNY,
FRANK B. BELCHER,
Attorneys for Petitioners.

BELCHER, KEARNEY & FARGO,
KENNY & MORRIS,
JEROME POLITZER,
MORRIS E. COHN,
HYMAN & HYMAN,
Of Counsel.